No. 85-1695

In The Supreme Court of the United States

October Term, 1985

Societe Nationale Industrielle Aerospatiale and Societe De Construction D'Avions De Tourisme,

Petitioners,

vs.

United States District Court
For The District of Iowa,

Respondent.

(Dennis Jones, John and Rosa George,
Real Parties in Interest)

On Writ of Certiorari
To The United States Court of Appeals
For the Eighth Circuit

BRIEF FOR THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., PRODUCT LIABILITY ADVISORY COUNCIL, INC., AND VOLKSWAGEN AG AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

WILLIAM H. CRABTREE
EDWARD P. GOOD
THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. and MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC.
300 New Center Building
Detroit, Michigan 48202

MICHAEL HOENIG*
HERBERT RUBIN
MARTIN RADVAN
HERZFELD & RUBIN, P.C.
40 Wall Street
New York, New York 10005
(212) 344-0680

*Counsel of Record

Dick Bailey Printers. 203 Richmond Avenue ■ Staten Island, New York 10302
Tel.: (212) 608-7666 — (718) 447-5358 — (516) 222-2470 — (914) 682-0848

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INTEREST OF THE *AMICI CURIAE*

This brief is submitted on behalf of the *Amici Curiae* upon consent of the parties to this proceeding. The Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA") is a trade organization whose member companies build over ninety-nine percent of all motor vehicles produced in

the United States.[1] Its members also manufacture other products such as farm, industrial, lawn and garden tractors, agricultural equipment, construction and mining machinery, locomotives, railroad rolling stock, winches, turbines, and gasoline and diesel engines for industrial, maritime and agricultural uses.

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit membership corporation[2] whose principal purpose is to submit briefs, as friend of the court, in appellate cases involving significant issues affecting the law of products liability.

Volkswagen AG ("VWAG"), a motor vehicle manufacturer organized under the laws of the Federal Republic of Germany, is sometimes sued in United States federal and state courts as a defendant in products liability cases. Such claims frequently present pretrial discovery issues involving the appropriate role of the Hague Evidence Convention, international law and comity. *E.g., Volkswagenwerk Aktiengesellschaft v. Superior Court,* 33 Cal. App. 3d 503, 109 Cal. Rptr. 219 (1973); *Volkswagenwerk Aktiengesellschaft v. Superior Court,* 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1981). VWAG was the aggrieved party seeking relief in prior proceedings before this Court involving issues similar to those presented in the instant case. See *Volkswagenwerk A.G. v. Falzon,* 461 U.S. 1303 (1983) (stay of Michigan court's discovery orders granted), *appeal dismissed,* 465 U.S. 1014 (mem.), *reh. den.,* 104 S.Ct. 1932 (1984) (mem.).

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[1]MVMA members are: American Motors Corporation; Chrysler Corporation; Ford Motor Company; General Motors Corporation; Honda of America Mfg., Inc.; LTV Aerospace & Defense Co., AM General Division; M.A.N. Truck & Bus Corporation; Navistar International Corp.; PACCAR Inc.; Volkswagen of America, Inc.; and Volvo North America Corporation.

[2]PLAC members are: American Honda Motor Company, Inc.; American Telephone & Telegraph; Automobile Importers of America, Inc.; Bell Helicopters Textron, Inc.; Black & Decker Company; The Budd Company; Clark Equipment Company; FMC Corporation; Fiat Auto U.S.A. and Ferrari, N.A.; The Firestone Tire & Rubber Company; Fruehauf Company; Great Dane Trailers, Inc.; International Playtex; Motor Vehicle Manufacturers Association of the United States, Inc.; Nissan Motor Corporation; Otis Elevator Co.; Porsche Cars North America, Inc.; Sturm, Ruger & Co.; Subaru of America, Inc.; and Toyota Motor Sales, U.S.A., Inc.

MVMA and PLAC members, their parent companies, subsidiaries and affiliates throughout the world, and all foreign corporations whose products reach the United States have a real and vital interest in the result reached in the decision below. That determination, reported at 782 F.2d 120 (8th Cir. 1986), held that a district court's *in personam* jurisdiction over a foreign litigant renders the Hague Evidence Convention[3] inapplicable to the production of evidence located within the territory of a foreign signatory. Agreeing with the "analysis" of a Fifth Circuit decision,[4] the Eighth Circuit panel stated, "[T]he Convention does not require deference to a foreign country's judicial sovereignty over documents, people and information . . ." 782 F.2d at 124.[5]

Although in some respects judicial "abrogation" of a solemn treaty commitment may be said to most directly offend the treaty signatories themselves, the impact also falls heavily upon the shoulders of companies such as *Amici's* members herein. These corporations manufacture, import and sell a wide variety of products which reach millions of users both here and abroad. They are subject to suit world-wide by numerous claimants seeking damages for some injury sustained during the use of a product or for some perceived disappointment or frustration in product performance.

Expansion of personal jurisdictional predicates such as "longarm" or "single act" theories in the United States means

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[3]Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature,* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, *reprinted in* 28 U.S.C.A. §1781 note at 95 (West Supp. 1986) (hereinafter refrred to as "Hague Evidence Convention" or the "Convention").

[4]*In re Anschuetz & Co.,* 754 F.2d 602 (5th Cir. 1985), *petition for cert. filed sub nom. Anschuetz & Co. v. Mississippi River Bridge Authority,* 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) (No. 85-98) (hereinafter referred to as *"Anschuetz"*). The Fifth Circuit, in turn, relied extensively upon *Graco, Inc. v. Kremlin, Inc.,* 101 F.R.D. 503 (N.D. Ill. 1984) (hereinafter referred to as *"Graco"*).

[5]*In re Societe Nationale Industrielle Aerospatiale,* 782 F.2d 120 (8th Cir.), *cert. granted sub nom. Societe Nationale Industrielle Aerospatiale v. United States District Court,* 54 U.S.L.W. 3809 (U.S. June 9, 1986) (No. 85-1695) (hereinafter referred to as *"Aerospatiale"*).

that the Eighth Circuit's "jurisdictional" rationale for ousting otherwise clear treaty obligations, if allowed to continue, will surely result in recurrent clashes with foreign sovereigns. In the Convention cases which have eventually reached this Court,[4] the governments of the insulted countries have vigorously and repeatedly made known their protests via diplomatic notes, *amicus* briefs and even direct communications to courts. Obviously, foreign justice and state ministries have quite enough to do without expending the time, energy and resources required to repeatedly intervene in private American litigation. What these messages amply demonstrate is that the eyes of the world are focused upon the solidity of treaty commitments and the predictability of their enforcement in the United States.

Since many MVMA and PLAC member companies are potential defendants abroad, the spectre of a world-wide "tit for tat" approach to increased "longarm" jurisdiction followed by unbridled discovery orders calling for production overseas of tons of documents, innumerable persons for deposition under foreign procedures and thousands of burdensome interrogatory answers is certainly not welcome. Yet, that threat is the potential end result when foreign sovereigns repeatedly see that American treaty commitments are easily bypassed via assertions of raw jurisdictional power. For obvious reasons, *Amici's* American companies have a vital stake in seeing to it that the integrity of international treaties is upheld.

Moreover, since some of *Amici's* member companies have parent, subsidiary or affiliate relationships with corporations organized and operating under foreign laws, there is a direct interest in seeing to it that such foreign companies are not exposed to American judicial sanctions which are imposed when they refuse to violate their national laws. Furthermore, since *Amici* member companies have substantial investments overseas, they

[4] *Volkswagenwerk A.G. v. Falzon*, 461 U.S. 1303 (1983), *appeal dismissed*, 465 U.S. 1014 (1984) (mem.), *reh. den.*, 104 S.Ct. 1932 (1984) (mem.) (hereinafter referred to as *"Falzon"*); *Club Mediterranee, S.A. v. Dorin*, 105 S.Ct. 286 (1984) (appeal dismissed) (hereinafter referred to as *"Dorin"*); *Anschuetz, supra* n. 4; *Messerschmitt Bolkow Blohm, GmbH v. Walker, et al.*, 757 F.2d 729 (5th Cir. 1985), *cert. granted*, 106 S.Ct. 1633 (1986) (No. 85-99), *cert. vacated* (June 9, 1986); *Aerospatiale, supra* n.5.

have a broad and general interest in the protections afforded by treaties of all kinds. If the Hague Evidence Convention is not appropriately deferred to, what can we rightfully expect of foreign sovereigns when they experience discomfort or inconvenience in executing their obligations under other treaties?

In short, the issues presented in this proceeding transcend the interests of the litigants or sovereigns directly involved. What this Court decides about this dispute is likely to have profound influence upon lower courts, the world's business community at large, foreign governments, future efforts to promote international harmony and understanding through binding treaties and, most importantly, the rule of law.

SUMMARY OF ARGUMENT

The Hague Evidence Convention is a binding federal law constitutionally declared to be "supreme Law of the Land." Therefore, federal court decisions categorizing the treaty procedures as a form of foreign "obstruction" or "intervention" in American judicial proceedings reason incorrectly and create needless international conflict. The Convention is not only valid domestic law but also a binding international obligation to be adhered to under the core international law principle *pacta sunt servanda*. Absence of language of "exclusivity" in the treaty, required by the existence therein of numerous flexible options for obtaining evidence abroad, has been misconstrued by some federal courts as a basis for refusing to apply the Convention's procedures. "Exclusivity" is demonstrated to be a false legal issue. The real question is whether the treaty is *binding* where required—an issue that must be answered in the affirmative.

Some federal courts have also mistakenly held that the Convention does not apply to foreign parties over whom the court has personal jurisdiction thereby permitting American judicial compulsion requiring production in the United States of

evidence, persons and information located abroad without adherence to the treaty. This misinterpretation is completely at odds with the framers' intent and inconsistent with the treaty's drafting history which shows that it applies to both parties and nonparties. Moreover, the brute application of raw jurisdictional power over the foreign party litigant is shown to be improper because it does nothing to assuage the offense to a foreign state's judicial sovereignty. Such insults are avoided by applying the treaty.

Numerous principles of treaty construction should have led the federal courts to adhere to the Convention. For example, the two sources of federal law should have been harmonized and not pitted against each other; since the treaty is "later in time" than the involved federal rules, it should prevail if there is a conflict; under the principle of *lex specialis derogat generali* (a particular law prevails over a general rule), the Convention predominates as a federal law intended to address the *specific* problem of obtaining evidence abroad. Similarly, the treaty's "comprehensiveness"; the need for a liberal construction; the need to recognize a *quid pro quo* received by other signatories; the "rule of effectiveness"; and the interpretation placed on the treaty by the involved signatory states should lead to a finding that the treaty is applicable.

At this stage, fears of alleged delay and unfairness to domestic litigants are entirely speculative and premature. This Court is not called upon to answer every potential difficulty that may arise in the future. The treaty and the federal rules possess sufficient flexibility to assure that evidence is obtained or that justice in the individual case may be done. What is required is a clear and unequivocal ruling by this Court calling for use of the Convention. In this regard, proposals to have a "comity" or "balancing test" to preliminarily determine whether the treaty should be used in the first instance are shown to be both unnecessary and impractical. The treaty should be applied as the convenient and binding mechanism prescribed by both federal and international law.

ARGUMENT

I. THE HAGUE EVIDENCE CONVENTION IS BINDING AMERICAN LAW TO BE APPROPRIATELY APPLIED, REGARDLESS OF AN AMERICAN COURT'S *IN PERSONAM* JURISDICTION OVER THE FOREIGN NATIONAL, IF THE EVIDENCE IS LOCATED WITHIN THE TERRITORY OF A FOREIGN SIGNATORY WHOSE SOVEREIGNTY WOULD BE OFFENDED BY AMERICAN JUDICIAL COMPULSION CONFLICTING WITH THE TREATY.

A. The Convention Is Binding American *Law. Therefore, Assertion Of A "Conflict" Between American and Foreign Law At Initial Stages Is A False Issue.*

A recurrent theme runs through the Eighth Circuit decision below and the *Anschuetz* and *Graco* opinions upon which it heavily relies. This is the notion of an intractable "battle" or "conflict" between supposedly "regressive" forces of *foreign* law on the one hand and a "more enlightened" *American* law of discovery on the other. See *e.g., Anschuetz,* 754 F.2d at 613-14 ("The provisions under the Hague Convention and the actions of German authorities thereto are in patent conflict with the Federal Rules of Civil Procedure and the rights which these rules grant to all litigants, including this plaintiff.") The Hague Evidence Convention is portrayed as a foreign "obstructionist" element while the federal rules purportedly represent the American objectives of truth and justice.

Thus, for example, the court below depicts the Convention as an instrument of foreign sovereignty that operates to "needlessly delay and frustrate the discovery process." 782 F.2d at 125. The *Anschuetz* court reasons that application of the treaty gives *foreign* litigants "an extraordinary advantage" while limiting their *American* counterparts to "cumbersome procedures and narrow range." 754 F.2d at 606. Indeed, resort to the treaty "encourages the concealment of information" by foreign defendants. *Id.* at 607. According to the *Graco* opinion,

the Convention should not be honored as an "international agreement to protect foreign nationals from American discovery . . ." 101 F.R.D. at 519-20; *Accord, Anschuetz,* 754 F.2d at 611. These courts view the treaty as a potential source of "very serious interference with the jurisdiction of United States courts" and a means to make "foreign authorities the final arbitors of what evidence may be taken from their nationals" in American courts. *Anschuetz,* 754 F.2d at 612; *Graco,* 101 F.R.D. at 522. See also *Anschuetz,* 754 F.2d at 612 (disagreeing with decisions in other cases because treaty "would give foreign authorities this power over the conduct of litigation in American courts.")

The rationales suggesting a "conflict" between opposing forces of foreign and domestic law mistakenly hearken back to pre-treaty times. They raise false issues at this stage. This is because the Convention is *not* an embodiment of some threatening foreign law; it *is* binding *American* law! The treaty's deference to foreign judicial sovereignty does not diminish its status as *American* law. The Convention's respect for, or incorporation of, some foreign procedures does not make it any less obligatory *as United States law.* The treaty's requirements, which assuredly differ from American practices, are not *foreign* impositions upon domestic litigants. Nor are they a form of *foreign* interference with the power of American courts. They are simply another species of United States legal obligations. The foregoing premise is basically unquestionable. Treaties made under the authority of the United States are expressly declared to be "supreme Law of the Land." U.S. Const., Art. VI, cl.2.'

'*Aerospatiale, Anschuetz* and *Graco* dealt with the interplay between the Convention and the *Federal* Rules of Civil Procedure. *E.g., Anschuetz,* 754 F.2d at 615 (Convention has "no application at all" to party "subject to the jurisdiction of a district court pursuant to the Federal Rules"). However, since most products liability suits are filed in *state* courts, the federal rulings create a serious anomaly in the Convention's application. A valid treaty preempts conflicting state law. *United States v. Belmont,* 301 U.S. 324, 331 (1937) ("state lines disappear"). A treaty "stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States." *Asakura v. Seattle,* 225 U.S. 332, 341 (1924). "[I]nternational agreements of the United

[Footnote continued on next page]

Thus, it is erroneous for these courts to project an international "conflict" stemming from the treaty's references to foreign law. If domestic litigants or courts have "chafed" somewhat over the Convention's different procedures, such discomfort is directly attributable to imposition by United States authorities of this more recent domestic law. As with all new laws which impose change, courts and litigants may have to revise their routine practices. Neither judicial second-guessing about the "wisdom" of the new domestic law nor judicial suspicions about its "fairness," however, authorize American courts to disregard the "supreme Law of the Land."

B. What Actually Creates An International Conflict Is An American Court's Failure To Apply The Treaty As The Courts Did Below.

The federal courts' refusal to apply a binding treaty because of perceived "unfairness" and "prejudice" to domestic litigants violates not only internal United States law but also international law. "Every international agreement in force is binding upon the parties to it and must be performed by them in good faith." Restatement, Tent. Final Draft §321 (1985). The underlying doctrine of *pacta sunt servanda* "is perhaps the most important principle of international law" and implies that "international obligations survive any restrictions in domestic law." *Id.* at Comment a. The treaty's promises must be kept; yet these courts have refused to do so.

It is not surprising that foreign government authorities have issued unequivocal statements objecting to a court's failure to faithfully apply the Convention in each of those cases which have reached this Court. The offense to foreign judicial sovereignty created by American judicial compulsion is

[Footnote continued from preceding page]

States are law of the United States and supreme over the law of the several States of the United States." Restatement of the Foreign Relations Law of the United States (Revised), Tent. Final Draft §131 (July 15, 1985) (hereinafter "Restatement, Tent. Final Draft.") The *Anschuetz* panel alluded to this difficulty when it suggested that contrary state court decisions might be explained away as resulting from a court that "felt more obliged to yield to the supremacy of a federal treaty over state laws." 754 F.2d at 608.

manifest. Even courts refusing "first resort" to the Convention as a matter of comity have recognized the nature of their international insult. See *Anschuetz,* 754 F.2d at 613; *Aerospatiale,* 782 F.2d at 125-26 ("the *greatest* insult to a civil law country's sovereignty would be for American courts to invoke the foreign country's judicial aid merely as a first resort, subject to the eventual override of their rulings under the Federal Rules of Civil Procedure") (emphasis supplied). This is equivalent to saying, "we should insult the foreign sovereign now so we will avoid heaping a greater insult upon the sovereign later." As the foreign states have repeatedly expressed, such an approach is unacceptable. Instead of applying the law to avoid international conflict, these federal courts have created one. It remains for this Court to restore adherence to the treaty as appropriate American law and to apply the core principle of *pacta sunt servanda* to effectuate binding international law.

C. The Question Of So-Called "Exclusivity" Of The Convention Is A False Issue. The Treaty Must *Be Applied Although, By Its Terms, The Foreign Sovereign's Procedures Will Not Always Govern And Harmonization With Federal Discovery Rules May Be Required.*

Unfortunately, disputes regarding application of the Convention in American courts have been dogged by wasteful debate over whether the treaty is the "exclusive" or "mandatory" means of obtaining evidence located abroad.[9] Such focus upon language of "exclusivity," not clearly expressed in

[9] *E.g., Aerospatiale,* 782 F.2d at 124 (defendants contend that treaty "provides the exclusive and mandatory procedures for obtaining documents and information located within the territory of a foreign signatory"); *Anschuetz,* 754 F.2d at 606 and n.7 (Hague Convention "is not exclusive"); *Id.* at 615 ("unlike the Hague Service Convention, which expressly provides that it is exclusive, the Hague Evidence Convention contains no express provision for exclusivity"); *Id.* at 615 (Convention should not be elevated to status of "the exclusive method of conducting discovery abroad"); *Volkswagenwerk Aktiengesellschaft v. Superior Court,* 123 Cal. App. 3d 840, 859, 176 Cal. Rptr. 874, 885-86 (1981) (Convention not "a preemptive and exclusive rule of international evidence gathering" but provides "a minimum measure of international cooperation").

the Convention itself, mistakenly elevates semantical considerations over substance. This Court should not get bogged down in the essentially semantic "exclusivity" debate. That simply is a false issue.

The question is not whether the treaty is *always* "exclusive" or "mandatory" under *any and all circumstances.* Plainly, it is not. To its credit, the treaty, by its own terms, provides the parties with some flexible options. For example, Article 27(b) provides that a state may permit "by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions." Similarly, Article 27(c) permits a state to allow, "by internal law or practice, methods of taking evidence other than those provided for in this Convention." Clearly, the "mandatory" nature of the letter of request requirement will depend upon the circumstances. To illustrate, the United States has "less restrictive" or alternate methods of taking evidence in this country which it allows foreign litigants to employ. 28 U.S.C. §1782(a),(b)(1966). Thus, the Convention is plainly not "exclusive" when foreign litigants pursue discovery in the United States. See 1 B.Ristau, International Judicial Assistance (Civil and Commercial) §5-40 at 255 (1984) (since United States has not made Convention exclusive method for securing evidence in its territory, Convention is "optional" in that respect). Because Article 27 permits contracting states to maintain or introduce in the future more liberal procedures, a rigid focus upon nonexistent language of "exclusivity" erroneously emphasizes the misnomer.

This is also obvious from other Convention provisions. Article 28, for example, reserves the right of a signatory state to ease its procedures in separate bilateral or multilateral agreements with other states. Thus, as a matter of technical draftsmanship, the more restrictive Convention procedures cannot be denominated "exclusive" or "mandatory." Similarly, Article 1 of the Convention provides that a state's judicial authority "may" request evidence to be obtained by means of a letter of request to the other state's competent authority. Use of the permissive word "may" is required because the Convention provides other flexible options to obtain evidence if the cir-

cumstances permit. For example, Chapter II of the Convention authorizes evidence to be taken, where appropriate, by diplomatic officers, consular agents and commissioners. Given the numerous options available to obtain evidence, it would have been poor draftsmanship to lace the treaty with mandatory words like "shall" or other language of "exclusivity." American courts critically probing the Convention for such language are engaging in a fruitless search in pursuit of a false issue.

The real question is not whether the Convention is "exclusive" or always "mandatory" but whether it is *binding* law when the circumstances are appropriate. A substantial body of scholarly commentary, employing powerful analytical insights, including review of the applicable language and history, convincingly demonstrates that it is binding law. For example, Bruno A. Ristau, former director of the Office of Foreign Litigation, U.S. Department of Justice, and United States representative to two Special Commissions convened by the Hague Conference on Private International Law to study and improve the implementation of the Hague Service and Evidence Conventions, states the following in his treatise, International Judicial Assistance [§5-40 at 255]:

> "[T]he Convention expressly permits a member state to make a variety of exceptions and to impose conditions and limitations, which other member states must honor. In this sense the stipulations of the Convention - including the member states' declarations and exceptions - are 'mandatory' upon the United States and must be honored by federal and state courts.
>
> "Where a state signifies that testimony can be secured in its territory for use in foreign proceedings *only* pursuant to the Evidence Convention, United States courts are bound by that declaration as a matter of federal treaty obligation, and the Convention is therefore 'mandatory' with respect to testimony sought by American litigants *in the territory of such state.* With respect to the taking of evidence in the territory of such state, United States federal and state procedural laws - as laws of the requesting state -have obviously been affected by the stipulations of the

> Convention." (Emphasis in original).*

D. The Court Below And The Decisions On Which It Relied Employed A Flawed Analysis As To The Intent And Applicability Of The Treaty.

1. The Treaty Applies When The Court Has Personal Jurisdiction Over The Foreign Party.

Aerospatiale, Anschuetz and Graco hold that the Hague Convention is inapplicable to discovery from a foreign party over whom the American court has personal jurisdiction. They limit operation of the treaty to willing nonparty witnesses who insist on testifying abroad or to unwilling nonparty witnesses against whom compulsion by the foreign sovereign is necessary. *Aerospatiale,* 782 F.2d at 125; *Anschuetz,* 754 F.2d at 611; *Graco,* 101 F.R.D. at 519-20. These courts hold, therefore, that a federal court's compulsory order to a foreign national to produce foreign-located documents, deposition witnesses and interrogatory answers in the United States does not violate the treaty. Acts abroad necessary to comply with an order requiring production in the United States, according to these courts, are merely "preparatory" and "do not constitute discovery in the foreign nation as addressed by the Hague Convention."

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*See also, Bishop, *Significant Issues in the Construction of the Hague Evidence Convention,* 1 Int'l Litigation Quarterly 1, 11-43 (1985) (publication of the International Litigation Committee of the ABA Section of Litigation); Heck, *U.S. Misinterpretation of the Hague Evidence Convention,* 24 Colum. J. of Trans. L. 231, 253-272 (1986); Radvan, *The Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters: Several Notes Concerning Its Scope, Methods and Compulsion,* 16 N.Y.U. J.Int'l L. & Pol. 1031, 1035-37 (1984); Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention,* 37 U. Miami L. Rev. 733, 758-61 (1983) ("[T]he Convention should be the primary means of securing evidence located in the territories of other states party—if not by its terms, then by a proper understanding of its intent and customary international law"); Note, *Gathering Evidence Abroad: The Hague Evidence Convention Revisited,* 16 Law & Policy in Int'l Bus. 963, 990-1002 (1984); Comment, *The Hague Convention on The Taking of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad,* 132 U. Pa. L. Rev. 1461, 1475-85 (1984); Recent Development, *Extraterritorial Discovery,* 25 Va. J. Int'l L. 249, 267-80 (1984).

Anschuetz, 754 F.2d at 611; *Aerospatiale*, 782 F.2d at 124-25; *Graco*, 101 F.R.D. at 521.

The hypothesis that the Convention does not apply to parties over whom the court has jurisdiction is inconsistent with the Convention's history which indicates that the framers expected the treaty would cover *both* party and nonparty witnesses. See Note, *Gathering Evidence Abroad, supra,* 16 L. & Policy in Int'l Bus. at 1001-02. For example, an originally submitted draft of Article 1 contained the words, "to obtain evidence (including the taking of statements of witnesses, parties or experts and the production or examination of documents or other objects or property). . ." After various revisions, the parenthetical words were deemed unnecessary and were deleted. The finally adopted words "to obtain evidence" were explained to be "more explicit and even broader than the proposed phrase" quoted above. *Ibid.* Thus, evidence from "parties" abroad was clearly contemplated.[10] A court's personal jurisdiction over a party has no bearing on the requirement to use Convention procedures. *Ibid.* See also, Sadoff, *The Hague Evidence Convention: Problems at Home of Obtaining Foreign Evidence*, 20 Int'l Law. 659, 667 (1986).

Moreover, the federal courts' doctrinal focus upon *raw jurisdictional power* is overemphasized. The mere fact that a court may have *power* to order an act to be done does not mean that the exercise of that brute power is proper, correct or even lawful. Indeed, one of the traditional functions of appellate courts is to police the legality of court orders. Phrased differently, the"existence of the power to order a thing done does not

[10]The Convention repeatedly uses the word "parties" to refer to *states* who are party to the Convention or other international agreements. *E.g.*, Articles 28, 29, 31, 32; see also Article 39 ("Party to the Statute of the International Court of Justice"). Thus, the Convention's general nonuse of the term "parties" to describe the litigants over whom a forum court has jurisdiction is understandable from the standpoint of practical draftsmanship. Similarly, it would have been uneconomical drafting to distinguish between "parties" and "nonparties" when both were intended in the phrase "to obtain evidence." It may be noted that the "letter of request" device known as "letters rogatory" (28 U.S.C.§1781), long "on the books" as a mechanism for obtaining evidence abroad, also does not distinguish between parties and nonparties.

resolve the question of the propriety of exercising that power, particularly in the international context." Oxman, *supra*, 37 U. Miami L. Rev. at 740. "The existence of rational and preferable alternatives should inform the decision in any case." *Id.* at 740-41. In the present context, the treaty procedures are those "rational and preferable alternatives." As Professor Oxman observes,

> "The notion that jurisdiction to command appearance before the court 'domesticates' the witness or party for all purposes relevant to the litigation is fallacious. The court should not ignore the foreign nationality or locus of the witness or evidence." Id. at 741.

Close analysis reveals that the *Graco* court's rationale that "discovery takes place here" even if the necessary information is located abroad, 101 F.R.D. at 521, is based on that court's assumption that use of the Hague Convention's procedures would deprive the American forum court of control over the discovery process. *Id.* at 520-22. That fear is unfounded becuse the Convention is binding, domestic American law - not intrusive foreign law. The Convention is federal law designed to facilitate obtaining evidence in foreign countries not to control American proceedings.

Under accepted principles of international law, each state has sovereignty over all activities taking place within its territory. Accordingly, no state may perform an act in the territory of a foreign state without the latter's consent. Oxman, *supra*, 37 U. Miami L. Rev. at 749. In the case of extraterritorial discovery, that "consent" has been given by certain foreign sovereigns only in the Hague Evidence Convention. The "consent" given must be used in accordance with its terms.

The limits of raw jurisdictional power over the litigant may be viewed from still another perspective: the difference between the interests of the individual litigants and the sovereign nations involved. This was expressed in the *amicus curiae* brief of the United States Solicitor General in *Volkswagenwerk A.G.* v. *Falzon*, No. 82-1888, at p.7 n.3:

> "The fact that a state court has personal jurisdiction over a party. . .does not mean that treaty limits on proceedings for the taking of evidence abroad somehow do not apply to discovery orders addressed to such parties. The Evidence Convention protects the judicial sovereignty of the country in which evidence is taken, not the interests of parties to the suit. Accordingly, its strictures apply regardless of the existence of personal jurisdiction."

The approach of federal courts focusing exclusively upon notions of jurisdictional power fails to come to grips with the offense to foreign judicial sovereignty. The Convention is the mechanism by which such insult is avoided.

In short, the federal courts' rationale for dispensing with use of the Convention whenever foreign parties are subject to their jurisdiction is erroneous. It ignores the fact that the treaty is binding federal law, as are the Federal Rules. Minimally, the courts involved should have harmonized these two sources of federal law and not pitted them against each other.[11] "[A]n Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . ." *Murray v. Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, Ch. J.). Or, as stated in Section 134 of the Restatement, Tent. Final Draft (1985), "Where fairly possible, a United States statute is to be construed so as not to bring it into conflict with international law or with an international agreement of the United States."

2. The Court Below Incorrectly Applied Principles Of Treaty Construction.

A number of major errors in the *Anschuetz* analysis and construction of treaty intent have already been discussed. Others abound. For example, United States treaties and federal statutes are said to be of equal authority, so that in case of inconsistency, the later in time should prevail. Restatement, Tent.

[11] See 1 B.Ristau, International Judicial Assistance §5-40, at 255 and n.78, at 268.1 (federal and state procedural laws "have obviously been affected by the stipulations of the Convention"; it is "as if" Rule 28(b) "had been amended by adding a proviso . . .").

Final Draft, §135, Comment a (1985); *Cook v. United States,* 288 U.S. 102, 118-19 (1933). Promulgated in 1938, the federal discovery rules clearly predated ratification of the Convention. Rule 28(b) governing depositions abroad was last amended in 1963. Thus, in the event of a conflict between the two, the rule of construction would require the treaty to "prevail." The *Anschuetz* court, however, after acknowledging the "later in time" rule, refused to "make such an apparently arbitrary ruling" because the 1980 and 1983 amendments of the federal rules made no mention of the treaty. *Anschuetz,* 754 F.2d at 608 n.12. This flawed analysis is astounding since the 1980 and 1983 amendments have nothing to do with the substance of the discovery devices available nor do they conflict with the treaty. Because the treaty was obviously "later in time," the courts should have held the Convention to supersede.

Other analyses leading towards a finding of treaty applicability have been enumerated by the commentators. One principle of statutory construction and international conflict of law doctrine is *lex specialis derogat generali* (a particular law prevails over a general rule). The Hague Convention is a federal law designed to address the *specific* problems of obtaining evidence located in foreign countries. The federal rules, however, govern the more *general* field of discovering evidence for use in United States courts. Therefore, application of the *lex specialis* principle suggests that the Convention prevails on the subject of discovery abroad. Comment, *supra,* 132 U. Pa. L. Rev. at 1485.

Still another factor is the treaty's "comprehensiveness." The Convention is "comprehensive in its terms," providing for all available methods of taking evidence abroad, and is exhaustive in its treatment of these procedures. This comprehensiveness "strongly indicates that the parties expected that any request for evidence in another contracting nation would use one of the methods provided by . . . the Convention." Bishop, *supra,* 1 Int'l Lit. Q. at 25. Another factor is the treaty's permission to signatories to provide "less restrictive" means of taking evidence. "Such provisions make no sense unless the Convention was intended to be exclusive other than for the listed exceptions. This common sense reading of the treaty finds support in

the contract doctrine of *expressio unius est exclusio alterius*—if one or more matters are specifically listed, others are excluded." *Id.* at 26.

Still another factor is the contractual setting in which the foreign signatories compromised their normal internal practices when adopting the treaty. If the Convention is not construed as binding, the civil law nations "received no meaningful quid pro quo for their concessions to the United States." Oxman, *supra,* 37 U. Miami L. Rev. at 760.

> "The civil law nations agreed under the convention to make the cooperative procedures for securing evidence in their territory more effective—even to the point of requiring their courts to use some common law practices alien to them. That agreement most probably was based on an expectation that the Convention procedures would be used and that their territorial sensitivities would be respected." *Id.* at 760-61. *See also,* Comment, *supra,* 132 U. Pa. L. Rev. at 1482.

In ascertaining treaty intent, courts also favor a "liberal construction" of treaties where two interpretations, one restrictive and one expansive of treaty rights, are possible. *Factor v. Laubenheimer,* 290 U.S. 276, 293-94 (1933); see also *Jordan v. Tashiro,* 278 U.S. 123, 127 (1928) ("narrow and restricted" construction of federal treaty must be rejected in favor of construction "enlarging" rights conferred). The Convention's comprehensive scheme for obtaining evidence and its preservation of carefully tailored restraints protecting state judicial sovereignty calls for a "liberal" construction which avoids violations of judicial sovereignty and which implements treaty performance in a spirit of *uberrima fides* (most scrupulous good faith). Bishop, *supra,* 1 Int'l Lit. Q. at 37-38. Closely related is the principle of interpretation called the "rule of effectiveness." This means that "treaties have a purpose, should be construed to be effective in achieving that purpose, and should not be rendered a nullity." *Id.* at 39. If the Convention were held inapplicable whenever the court has jurisdiction over a party, the Convention would be "robbed of any significance" with respect

to discovery from foreign parties thereby rendering the treaty a "nullity" in the most frequent of situations. *Ibid.*

Courts also look to the interpretation placed upon the treaty by the governmental agencies responsible for its negotiation and enforcement, *Sumimoto Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 184-85 (1982), as well as the interpretation placed on the treaty by the other signatory nations. *Air France v. Saks,* 470 U.S. __, __, 105 S.Ct. 1338, 1345 (1985) ("we find the opinions of our sister signatories to be entitled to considerable weight"). The Government authorities of Germany, France and the United Kingdom have repeatedly and unequivocally asserted via diplomatic notes, *amicus* briefs and correspondence to courts that the Convention procedures are binding and must be followed. While the expressed position of the United States has been somewhat conflicting and inconsistent, in no case has the United States endorsed the view that the Convention never applies to parties over whom American courts have jurisdiction. On the contrary, the United States view has either amounted to expression of support for foreign state protests[12] or outright adherence to the Convention's procedures[13] or to suggestions that deference to the Convention is desirable "in appropriate cases" for reasons of "comity" in order to avoid "international friction arising from the enforcement of extraterritorial discovery orders."[14]

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[12] *E.g. Volkswagenwerk Aktiengesellschaft v. Superior Court,* 33 Cal. App. 3d 503, 505-06, 109 Cal. Rptr. 219, 221-22 (1973) (pre-Convention case; German aide-memoire to superior court accompanied by U.S. State Department letter "expressing its support for the position taken by the German Embassy" and offering "its services in transmitting letters rogatory to the German authorities as provided by federal law").

[13] *E.g.,* Solicitor General's *Amicus Curiae* Brief in *Falzon,* at pp. 5-6 (Convention "deals comprehensively" with methods to obtain evidence abroad; the treaty signatories "contemplated that proceedings not authorized by the Convention would not be permitted"; the treaty "must be interpreted to preclude an evidence taking proceeding" in foreign country "if the Convention does not authorize it and the host country does not otherwise permit it").

[14] *E.g.,* Solicitor General's *Amicus Curiae* Brief in *Dorin* at pp. 9 n.10, 13; Solicitor General's *Amicus Curiae* Brief in *Anschuetz* and *Messerschmitt,* at pp. 8, 11 (American courts "should utilize" the Convention procedures and "refrain, when feasible, from ordering a party to perform acts that would violate the laws or clearly articulated policies of a foreign government").

Whereas the focus of German, French and United Kingdom assertions has been upon adherence to the treaty as binding, the United States' somewhat inconsistent progression of statements has only recently culminated in a view that the Convention is not "exclusive." As demonstrated earlier at p. 11, *supra,* technical non-"exclusivity" of the treaty is but a statement of the obvious. The United States, however, does coincide with its sister signatories in the major objective that offenses to foreign judicial sovereignty should be avoided and concurs that the Hague Convention's procedures are a useful mechanism to achieve this objective. In light of the agreement of *all* government authorities as to the essential desirability of utilizing Convention procedures even when parties are subject to American court jurisdiction, the contrary interpretation of the *Aerospatiale, Anschuetz* and *Graco* federal courts should be rejected by this Court in favor of a harmonious result that is commensurate with the sanctity of treaties and the core principle of *pacta sunt servanda.*

3. Fears of Alleged Delay And Unfairness To Domestic Litigants Are Entirely Speculative And Premature.

The courts below expressed fears that American litigants would be delayed and frustrated in discovery if forced to use Convention procedures. However, as indicated above, the treaty is binding *American* as well as international law. Any purported inconvenience to litigants has been imposed by the force of United States authorities. The personal disapproval by several judges of some of the treaty's terms is legally irrelevant. The alleged prospect of some delay or restrictions is, therefore, a false legal issue. The fears expressed in *Aerospatiale, Anschuetz* and *Graco,* in any event, are decidedly anticipatory, premature and speculative. In none of these cases was resort to the Hague Convention procedures permitted. There was no factual basis to support the fears expressed. Such speculation is far too slender a reed upon which to base a treaty violation or an insult to foreign sovereigns.

4. The Treaty Complements The Federal Discovery Rules. What Is Involved Is Harmonization Of The Two.

Since the treaty and the federal discovery rules are both sources of federal law, they should be construed to avoid conflict. Restatement, Tent. Final Draft §134 (1985). That should not be difficult since the systems are essentially complementary.

> "The Convention permits all discovery devices provided for in the Federal Rules. Indeed, it is through the Convention that, for the first time, U.S.-style discovery abroad has been made possible and, more importantly, become a contractual obligation of other Contracting States. Thus, the Hague Evidence Convention does not invalidate, repeal, or supersede the Federal Rules or, for that matter, the state law equivalents of the Federal Rules. Rather, the Convention complements these rules with respect to the special situation of taking discovery in other Contracting States." Heck, *supra,* 24 Colum. J. Trans. L. at 256-57; See also *Id.* at 257-78; 1 B. Ristau, International Judicial Assistance §5-40, at 255 and n.78, at 268.1.

What *is* needed is an unequivocal commitment by American courts to apply both sources of *American* law in a reasonable fashion and to reasonably harmonize procedures so that possible difficulties in individual cases are resolved.

At this stage, however, neither this Court nor the courts below are called upon to answer every potential difficulty that may arise in the future. Both the treaty and the Federal Rules possess sufficient flexibility to assure that evidence is either appropriately obtained or that justice in the individual case may be done. Foreign government authorities have expressed a willingness to cooperate in expediting reasonable requests in accordance with Convention procedures and even to consider modifying their internal practices or their restrictive reservations under the Convention. In its *amicus curiae* brief in *Anschuetz* and *Messerschmitt,* the Federal Republic of Germany observed, at p. 10, that of the 151 Convention requests addressed to German courts since Germany ratified the treaty, "131 of these requests were accepted and executed. Most of the remaining 20 requests were rejected because the evidence to be taken was not suffi-

ciently identified or the request was for the production of documents under pretrial discovery." The German government also announced its consideration of "regulations to permit the granting of certain of these requests [for the production of documents]." The *Anschuetz* ruling, however, "hinders this development" since the contemplated regulations "would be futile." *Ibid.*

As binding federal law, the treaty should be given an opportunity to effectuate its salutary purposes. If it proves unsuccessful in the long run, the United States Government has sufficient means under the treaty and international law to assert changes or remedies. For example, Article 36 of the Convention provides that, "Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels." Additional flexibility exists to negotiate and implement changes to resolve difficulties under Article 27, which allows member states to permit different or "less restrictive" methods of taking evidence and conditions. Similarly, Article 28 allows agreements between two or more signatories "to derogate from" various Convention procedures. Obviously, therefore, if the treaty proves unsatisfactory from the United States point of view, sufficient channels exist for negotiating and implementing improvements. Finally, Article 41 allows "denunciation" of the treaty after the applicable period if that course were later found to be warranted. In short, there is little excuse for not undertaking a *good faith* effort to effectuate the "supreme Law of the Land" and international law. Restatement, Tent. Final Draft §321 (1985).

II. SINCE THE CONVENTION IS BINDING FEDERAL LAW, GENERAL COMITY PRINCIPLES TECHNICALLY ARE NOT REQUIRED AT THIS STAGE BUT MIGHT PROVE HELPFUL TO RESOLVE LATER CONFLICTS.

Because the Convention is binding federal and international law, adherence to its procedures is required. A "comity" approach to determine whether resort to the Convention is "desirable" in the first instance is unnecessary.[1] However, since the federal courts involved here thus far refused to apply the Convention procedures, no one can predict with certainty whether and, to what extent, harmonization of potential conflicts might be necessary *after* a pattern of full treaty use has emerged. It is conceivable that problems in implementation of court orders on both sides might arise, for example, in the area of "privileges" where, under Article 11, the privileges accorded by different sovereigns might be invoked. In such a later stage situation, principles of "comity" may truly prove helpful in avoiding international friction via "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot,* 159 U.S. 113, 163-64 (1895).

In his March 1986 *amicus curiae* brief in *Anschuetz* and *Messerschmitt,* however, the Solicitor General suggested a "comity" analysis to determine whether resort to Convention procedures is warranted in the first instance. Brief, at pp. 11-12. According to this view, which is contrary to the firm position taken by the Solicitor General in the *Falzon* case, "the comity inquiry depends on the circumstances of each individual case." *Id.* at 12. The Solicitor General suggests that the Restatement

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[1] "In the absence of a definitive ruling by this Court and in the face of perceived conflicts, notions of "comity" have assisted some state courts in exercising judicial restraint or in requiring so-called "first resort" to Convention procedures. *E.g., Gbr. Eickhoff Maschinefabrik Und Eisengieberei v. Starcher,* 328 S.E.2d 492 (W.Va.1985). This approach is far preferable to the approach of federal courts rejecting treaty application.

(Second) of Foreign Relations Law of the United States §40 (1965) sets forth some of the relevant considerations. *Ibid.*

The Solicitor General's suggestion of a "comity" approach and "balancing tests" to be applied on an *ad hoc*, case-by-case basis appears to stem from Departments of Justice and State concerns about extraterritorial enforcement of United States regulatory laws. See Dam, *Economic and Political Aspects of Extraterritoriality,* 19 Int'l Law. 887, 895 (1985):

> "Within the U.S. Government, a consensus now exists that in deciding whether or how to act, we should weigh conflicting interests, laws or policies of foreign jurisdictions. The United States has a long-term national interest in following this comity approach."

See also, Kestenbaum & Olson, *Federal Amicus Intervention in Private Antitrust Litigation Raising Issues of Extraterritoriality: A Modest Proposal,* 16 Int'l Law. 587 (1982); Waller & Simon, *Analyzing Claims of Sovereignty in International Economic Disputes,* 7 Nw. J. Int'l L. & Bus. 1 (1985).

Whatever may be the objectives of United States agencies in enforcing American regulatory or substantive law extraterritorially, however, such goals are entirely absent when considering the use of *procedural* devices already adopted as domestic federal law. The process by which substantive law is attempted to be applied to acts abroad involves careful United States government consideration of political trade-offs between regulatory principles and foreign policy concerns. This is forcefully described in former Solicitor General, now Judge Robert H. Bork's 1982 article. "We routinely seek to balance our enforcement interests with the interests other nations may have with respect to the conduct in question." Bork, *International Antitrust - Introduction,* 18 Stan. J. Int'l L. 241, 241-43 (1982) (quoting statement of Assistant Attorney General William Baxter before House Subcommittee). However, no such political and governmental balancing is involved in a private litigant's suit:

> "But no such process occurs when a private suit goes forward. The balancing process. . .must be performed initially by a district court, if indeed it is performed at all. . . .

> "The district court is then placed in a very peculiar position. Unless the judge adopts an extreme position -either that the interests of the foreign government are no concern of his or that any such interest is reason to dismiss the complaint - he is forced into a largely political and managerial role that is usually, and ideally, played by the executive or the legislative branch and eschewed by the judiciary." *Ibid.* (Quoted in Oxman, *supra*, 37 U. Miami L. Rev. at 786-87 n.144)

In purely private litigation such as product liability cases, the objectives of Government agencies to "balance" regulatory and foreign policy concerns are not truly present. As Professor Oxman has observed,

> "With respect to ordinary common law civil actions, neither an existing federal policy nor direct involvement by the Department of Justice in the litigation is available as a political basis for a decision that could offend a foreign state. Under the United States Constitution, American state and federal courts must respect the Hague Evidence Convention." Oxman, *supra*, 37 U. Miami L. Rev. at 787.

Practical considerations lead to the same conclusion. The treaty is binding international and federal law to be applied by its terms when appropriate. It is a definitive guide on how to proceed in a manner surely acceptable to the other states. A vague and imprecise "balancing test," however, will inevitably yield unpredictable, conflicting decisions from state to state and even from court to court within the same state.[16] With multiple

[16] *Compare Graco,* 101 F.R.D. 503 (N.D.Ill. 1984) *with Schroeder v. Lufthansa German Airlines,* 18 Av.Cas. (CCH) 17,222 (N.D.Ill.1983); *Compare Lasky v. Continental Prods. Corp.,* 569 F.Supp. 1227 (E.D.Pa. 1983) *with Philadelphia Gear Corp. v. American Pfauter Corp.,* 100 F.R.D. 58 (E.D.Pa. 1983). The potpourri of Hague Convention decisions already extant which utilize different approaches and rationales is further illustrative. See Castillo, *The Hague Evidence Convention: Foreign Parties Must Provide Broad Discovery in U.S. Litigation,* Fla. Bar J. 43 (Aug. 1986) (collecting cases); Note, *Hague Evidence Convention: A Practical Guide To The Convention,* 16 Ga. J. Int'l & Comp. L. 73 (1986) (with jurisdictional digest of cases).

state court systems in 50 states, as well as innumerable potential conflicts among the federal judiciary, the predictability and uniformity of approach necessary in this area would be impossible to achieve. The ministries of foreign nations cannot practicably be expected to file diplomatic protests or *amicus* briefs in each and every private lawsuit involving some extraterritorial discovery demands. Furthermore, because of frequent appeals in this area, mandamus petitions and other related proceedings, the result would be chaotic. Trial judges would repeatedly have to weigh political considerations with which they are unfamiliar or which the litigants do not satisfactorily call to their attention and appellate courts would be required to repeatedly review the adequacy of the "balancing" process. Unbridled discretion regarding political questions about foreign sovereignty, foreign laws and foreign state interests should not be left to all judges in all federal and state actions all the time. Offenses to foreign judicial sovereignty must predictably be avoided. The Solicitor General's suggested "comity" approach is, in reality, a discretionary license for some courts to disregard a binding federal and international law and to rule in a manner that leads to international friction.

One need look no further than the *Anschuetz* case itself to illustrate the point. Few would objectively regard the Fifth Circuit's opinion as a true "balancing" of all relevant "comity" interests. Indeed, the Solicitor General's March 1986 *amicus* brief in *Anschuetz* concedes, in a mammoth understatement, that "the court's comity discussion was rather cursory. . ." Brief, at p.13. There simply is no need for a vague, *ad hoc* and imprecise "balancing" approach in lieu of the uniform, predictable approach offered by the Convention - which the foreign sovereigns have committed themselves to support. A definitive, predictable and stable rule clearly calling for use of the Convention would eliminate debate about misleading labels such as "exclusivity," "first resort" or "comity." Because of the potential for confusion, this Court should declare the treaty to be part of the fabric of American law in preference to an imprecise "balancing" approach.

CONCLUSION

The decision of the court of appeals should be reversed.

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Respectfully submitted,

MICHAEL HOENIG*
HERBERT RUBIN
MARTIN RADVAN

HERZFELD & RUBIN, P.C.
40 Wall Street
New York, New York 10005
(212) 344-0680

WILLIAM H. CRABTREE
EDWARD P. GOOD

*Counsel of Record

THE PRODUCT LIABILITY
ADVISORY COUNCIL, INC. and
MOTOR VEHICLE MANUFACTURERS
ASSOCIATION OF THE UNITED
STATES, INC.
300 New Center Building
Detroit, Michigan 48202